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IN THE
Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-185
—

AMERICAN INTERNATIONAL REINSURANCE
COMPANY, INC.,
Petitioner,

v.

AIRCO, INC.,
Respondent.

—
**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF CUSTOMS AND PATENT APPEALS**

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TABLE OF CONTENTS

	Page
Introduction	1
Objection to Jurisdiction	1
Questions Presented	4
Additional Constitutional, Statutory, and Rule Provisions Involved	5
Statement of the Case	5
The Facts	5
The Dispute	7
No Question Presented Deserves the Attention of this Court	7
No Decisional Conflict	9
Conclusion	11

APPENDICES

A—U.S. Constitution, Art. III, Sec. 2, cl. 2	1a
B—15 U.S.C. §§ 1053, 1112, 1127	2a
C—28 U.S.C. §§ 1256, 2101(c)	5a
D—Excerpts, CCPA Rules and Procedures Handbook	6a

TABLE OF AUTHORITIES

Cases:	Page
<i>Dann v. Chatfield</i> , — U.S. —, 54 L.Ed. 155 (1977)	4
<i>Nebraska v. Pink</i> , 317 U.S. 264 (1942)	4
<i>Sanabria v. United States</i> , 46 L.W. 4646	4
<i>United Drug Company v. Theodore Rectanus Co.</i> , 248 U.S. 90, 97 (1918)	10
<i>The Trade-Mark Cases</i> , 100 U.S. 82, 86 (1879)	10
 Other Authorities:	
United States Constitution, Article III, Section 2, Clause 2	2, 5
15 U.S.C. § 1053	5, 8
15 U.S.C. § 1112	5, 8
15 U.S.C. § 1127	5, 11
28 U.S.C. § 1256	2
28 U.S.C. § 1258	5
28 U.S.C. § 2101(c)	2, 5
37 C.F.R. 6.1	8
 Black's Law Dictionary, 4th Ed.	3
Rules of the Court of Customs and Patent Appeals (1977)	2, 5, 7
Procedural Handbook of the Court of Customs and Patent Appeals (1975)	2, 5
Proceedings of the Fourth Judicial Conference of the Court of Customs and Patent Appeals, May 18, 1977	3

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INTRODUCTION

There are three reasons why this Court should deny this petition. First, the petition is untimely filed. Second, there is no difficult question of federal law to be decided. Third, the decision below conflicts neither with any decision of this Court nor with the decision of any other court or administrative tribunal. Respondent will treat each in turn.

OBJECTION TO JURISDICTION

The appellate jurisdiction of this Court is "under such Regulations as the Congress shall make," United States

Constitution, Article III, Section 2, Clause 2 (App. A). Congress has limited the appellate jurisdiction from the Court below to writs of certiorari, 28 U.S.C. § 1256, and required, in a civil case such as this, that petitions for those writs be filed within ninety days of entry of the "judgment or decree," 28 U.S.C. § 2101(c) (App. C).

The Court of Customs and Patent Appeals promulgated its decision in this case on Thursday, February 23, 1978. This was endorsed "Decided February 23, 1978." The decision was accompanied by the opinion of the Court, written by Judge Lane, concurred in by Chief Judge Markey and Judges Rich and Baldwin and a dissenting opinion by Judge Miller. On that date, the Clerk of the Court mailed counsel a Notice stating, *inter alia*, "Enclosed is a copy of the Court's decision and opinion . . . A judgment has been entered this day in accordance therewith."

Timely by CCPA rules, petitioner sought rehearing. It was denied that relief on April 27, 1978. Thereafter, still pursuant to that Court's rules, its mandate, stating that the case was "ORDERED and ADJUDGED: Affirmed" and "Dated February 23, 1978" was certified on May 4, 1978 by its Clerk to the Patent and Trademark Office.

The petitioner waited until August 2, 1978 to docket this petition and has, by its delay, thereby removed the matter from the jurisdiction of this Court if any act or event prior to May 4, 1978 constitutes the "judgment or decree" of the Court below. That Court's current rules, effective January 1, 1977, use neither the word "judgment" nor "decree." Rules 5.12 and 6.1 and 6.12 (App. D) use the terms "decisions," "opinions," and "mandates," to indicate that decisions predate mandates and that decisions may have accompanying opinions.

The current Procedural Handbook of the CCPA (App. D) explicitly equates "decision" with "entry of judgment." The prior rules used the term "date of judgment" in the

Rules for calculating the time for rehearing and mandate and the change was of language, not substance.¹ The aforementioned Notice stated that a judgment was entered February 23. The mandate was *dated* February 23 and stated the case was "Ordered and Adjudged" on that date.

This case is in the nature of an equity proceeding, that is no jury or money damages are involved. A decree is a judgment of a court of equity, *Black's Law Dictionary*, Fourth Edition. To "adjudge" is to "decree" and to "order" is to "mandate," "command," or "direct," *Black's, supra*.

The foregoing argument clearly demonstrates that the "decree" or "judgment" of the Court of Customs and Patent Appeals occurred on February 23, 1978. Hence, the time for petitioning this Court for a writ of certiorari

¹ Effective January 1, 1977 the rules of the CCPA were amended. The purpose of the amendments were explained at the Court's next judicial conference. The comments of the Clerk, George E. Hutchinson, were as follows:

"V. The former rules provided that a petition for rehearing could be filed within 20 days after 'entry of judgment.' At the same time the mandate rule stated that the mandate would issue after 21 days from the 'date of judgment.' As you can see, this created a hiatus of one day. The new rules solved this problem and now provide that a petition for rehearing may be filed within 21 days from 'date of decision.' You may have caught the change in language between 'entry of judgment' and 'date of decision' in connection with this rehearing rule. I did this on purpose to emphasize the fact that there was a language change in this rule and the rule concerning mandates. Both rules now use the term 'date of decision' rather than 'entry or date of judgment.' *This was not a substantive change but one only of language* to emphasize the fact that time periods for either a petition for rehearing or the issuance of a mandate are from the actual date of the decision or, to state another way, the issuance of the court's opinion."
 [Emphasis Added]

Proceedings of the Fourth Judicial Conference of the Court of Customs and Patent Appeals, May 18, 1977 (not yet published).

expired on May 24, 1978 and this petition was filed ten weeks late.

If there could be any question that the "judgment" in this case was not entered February 23, 1978² but on ensuing May 4, this Court ruled on that precise point last October 3 in *Dann v. Chatfield* (No. 76-1559) where a petition from the same Court below was filed ninety days after the mandate was certified but ninety days and three weeks after the decision and opinion. That ruling in its entirety is equally applicable here:

"Petition for writ of certiorari to the United States Court of Customs and Patent Appeals, in 76-1559, is denied as untimely filed, 28 U.S.C. § 2101(c)." 54 L.Ed. 2d. 155.³

QUESTIONS PRESENTED

The petition lists four questions said to be "presented". If this case does present the first three, the answer to each is, clearly, "NO." The fourth is more simply not even presented. What is presented is simply this:

May respondent register, under the federal trademark act, a mark which it has used for over forty years in connection with the administration of annuity plans for employees, retired employees, ex-employees, persons similarly connected with subsidiaries, affiliates, and former divisions, and non-employee successors and beneficiaries of all such persons?

² It may be argued that the filing of a petition for rehearing tolls the period provided by 28 U.S.C. § 2101(c) (App. C) until its denial. *Nebraska v. Pink*, 317 U.S. 264 (1942). Such denial took place in this case on April 27, 1978. If such argument were to be accepted, then the present petition would have been due on July 26, 1978 and would have been untimely by only one week—not ten.

³ Compare *Sanabria v. United States*, 46 L.W. 4646 (1978) noting the time period for criminal petitions is not jurisdictional.

ADDITIONAL CONSTITUTIONAL, STATUTORY, AND RULE PROVISIONS INVOLVED

In addition to the provisions cited by Petitioner, this case involves: Article III, Section 2, Clause 2 (App. A); 15 U.S.C. §§ 1053, 1112, and 1127 (App. B); 28 U.S.C. §§ 1258 and 2101(c) (App. C); Rules and Procedural Handbook of the Court of Customs and Patent Appeals: Rules 5.12, 6.1 and 6.2 and Handbook, section 19 (App. D).

STATEMENT OF THE CASE

The Facts

Opposer's list of "The Undisputed Facts" is grossly misleading, as well as being, in some respects, simply wrong. Respondent reproduces below, verbatim, facts correctly discerned by the Court below:

"In 1935, applicant adopted a Retirement Income Plan for its employees, which plan was described in a brochure which it distributed to its employees; the 1935 brochure prominently displayed the term AIRCO. The original plan, which was a voluntary contributory pension-annuity plan, was offered only to employees of applicant and of applicant's subsidiaries; subsequently, it has been expanded to also include employees of any affiliate of applicant. The details of the plan, and changes that have occurred since its adoption, are not relevant to the issues on appeal. Suffice it to say that participation in any of applicant's pension-annuity plans stems in every case from having been an active employee (or survivor) of applicant, or of a subsidiary or affiliate of applicant.

"The plans are administered by a pension committee, which committee consists of three members of applicant's board of directors. The pension committee has the power to make final, unappealable determinations of benefits due in the event of any conflict between a

participant and the insurance company or trustee (applicant is not the actual insurer or trustee).

"The Airco Pension Plans vest after a period; currently, there are 727 participants of the plan who are not now, but were once, Airco employees [The plans, of course, also include thousands of persons still employed.]. Applicant maintains records on them and after they reach retirement age will direct the insurer to make annuity payments to them.

"In 1970, Airco sold its Chemicals and Plastics Division. A part of the purchase agreement was that service with the purchaser counts for vesting under the Airco Pension Plan; applicant continues to maintain records of those persons and will, when they reach retirement age, direct annuity payments.

"A major current responsibility of applicant relates to the annuitants who are presently receiving benefits. Each month the insurer prints and mails checks to these annuitants from computer-based records; each month applicant sends to the insurer information to alter the monthly annuity payments. This information includes, *inter alia*, new annuitants, address changes, deceased annuitants, and payment of death benefits. This work is done under the supervision of the pension committee, and applicant has the sole responsibility for the accuracy of the foregoing information; the insurer's responsibility and authority is limited to making the changes and payments as instructed." *American International Reinsurance Co. v. Airco, Inc.*, 570 F.2d 941, 942-943 (C.C.P.A. 1978).

The facts thus recited by the court below are sufficient to support its judgment; a complete and detailed recitation of all that Airco has done over the forty-year history of its administration of its pension plans would require scores of pages to recite.

Obviously respondent's participation in the policies and problems of administering its pension plans goes far

beyond anything properly defined by petitioner's epithet, "clerical".

The Dispute

Respondent, on June 27, 1974, applied to the Patent and Trademark Office to register the mark "AIRCO" as a service mark on the Principal Register in Class 36, relying on the factual history set out above. The application recited May 1, 1935 as the date of first use in commerce and copies of the brochure referred to by the CCPA in the passage from its opinion quoted above were filed as the requisite specimens showing use of the mark. The Examiner passed the application for publication, reciting applicant's services as "administering annuity plans for others"; it was so published and petitioner opposed. The Trademark Trial and Appeal Board, on cross-motions for summary judgment dismissed the opposition; the CCPA affirmed, and the present petition ensued.

NO QUESTION PRESENTED DESERVES THE ATTENTION OF THIS COURT

As the petition notes on page 12, the registration sought by respondent would stand as *prima facie* evidence of an exclusive right. The Opinion below shows that respondent's attainment of this right is of considerable, though perhaps still contingent, interest to the parties to this suit. However, the decision below presents no difficult question of federal law which needs to be decided by this Court and certiorari for that reason is unwarranted. Rule 19.1(b) of this Court. Indeed, the only question involved, a factual one, is who provides the services for which registration is sought. On the identical record,⁴ the Examiner, the Trademark Trial and Appeal

⁴ The petitioner admitted applicant's *ex parte* papers to the Examiner were accurate and truthful, as it had to, in its motion

Board, and the Court of Customs and Patent Appeals, have decided that respondent has provided these services.

The case does not present the question of whether the owner of a mark used in connection with a service performed in commerce may register the mark. The statute explicitly so provides. 15 U.S.C. § 1053 (App. B).

The case does not present the question of whether the seller or administrator of an insurance plan may register his mark. Trademark classification pursuant to 15 U.S.C. § 1112 (App. B) so provides. Service mark class 36 is: "36. Insurance and Financial", 37 C.F.R. § 6.1.

The case does not present the question of whether a service offered only to a limited class of customers is unregisterable. The petitioner does not so assert, wisely, in view of the unqualified language of the statute.

On the facts, it must be uncontested that:

1. A service in interstate commerce has been performed for over forty years.
2. The service is administering an annuity program.
3. The insurance companies function as the agents (as well, in some cases, as underwriter) for some administrator.
4. Such an administrator is entitled to register his mark.

Petitioner's entire case is that the Examiner, the Board, and the Court below made an erroneous legal judgment that respondent as that administrator, is entitled to registration. Petitioner's contention is that respondent does not qualify as a registrant because such administrative services are not its primary business.

for summary judgment. Upon that admission, the applicant, respondent here, based its countermotion for summary judgment, the grant of which is here sought to be reviewed.

The petition attempts to substitute half-truth for controlling legal and factual reality. It states (p. 5), " * * * ultimate responsibility for administering the plans is stated to reside in a 'Pension Committee' comprising persons not employed by respondent." But the petition conveniently does not reveal, in this statement of so-called undisputed fact, that the Pension Committee is made up of three members of respondent's Board of Directors. They are outside directors ineligible for pension under the Airco plan in order to remove any personal conflict of interest. As such, they are agents acting, by direction of the whole Board, for the respondent Airco, Inc., which is therefore necessarily "the administrator." Moreover, for the plans under Pension Committee supervision, insurers and trustees are selected and changed, and the very character of successive plans established and amended, by Airco, Inc., as a corporate decision of the whole Board, and very substantial record-keeping and correspondence is done by the Airco pension staff personnel, in direct Airco employ.

NO DECISIONAL CONFLICT

The decision below presents no conflict with any decision of this Court (or of any other court or administrative tribunal) and to grant certiorari based on that reasoning would be unwarranted. The petition does state several propositions which are inconsistent with the decision and which it must hope to induce this Court to assume are proper statements of the law. These are:

1. A person may register a mark for only his principal goods or services.
2. If a person does not have a license to underwrite insurance, he may not register a mark he uses in the lawful administration of an insurance plan.
3. A person may not register a mark if his customers already know him.

4. A person may not register a mark for a service unless a competitor offers a more attractive price for that service.

5. Only the largest concerns in a line of business are entitled to register their marks.

All of the above are interesting and debatable suggestions for enactment into federal trademark policy. Petitioner does not really suggest that they now find support in either statutory or decisional law.

Petitioner cites two decisions of this Court, neither of which supports its argument. *United Drug Company v. Theodore Rectanus Co.*, 248 U.S. 90, 97 (1918) presented a question of territorial conflict of marks. Since the applicable federal statute did not apply to intrastate commerce, the Court decided the case on common law principles. It found that prior usage by petitioner in Massachusetts gave it no grounds to complain of a subsequent innocent usage in Kentucky. In that context, it stated that a trademark was "a right appurtenant to an established business."⁵

The second citation, to *The Trade-Mark Cases*, 100 U.S. 82, 86 (1879), is to a decision holding the 1870 trademark act unconstitutional as including protection of marks used only in intrastate commerce. The petition cites, on page 9, a passage, not of Mr. Justice Miller's opinion, but of the Attorney General's argument.

Be that as it may, the statement "commerce . . . comprehends intercourse for the purpose of trade" gains petitioner nothing. The service of administering these annuity plans has been regulated by the federal government since 1958, first under the Welfare and Pension Plan

Disclosure Act, 29 U.S.C., Chapter 10, succeeded by the Employment Retirement Income Security Program (ERISA), 29 U.S.C., Chapter 18. This is not the case in which to find that the ERISA statute is unconstitutional.

The administration of these plans is an act in interstate commerce and the trademark laws, extending to "all commerce which may be lawfully regulated by Congress," 15 U.S.C. § 1127 (App. B), permit the Commissioner to register this mark upon application of respondent.

CONCLUSION

The petition should be dismissed because it was untimely filed, because it presents no question *per se* compelling the attention of this Court, and because it not only presents no decisional error, but also no conflict with any other decision at all.

Respectfully submitted,

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⁵ Non-profit institutions such as the Boy Scouts, the Girl Scouts, and universities are in "business" for trademark purposes, common law and statutory. In any event, respondent is certainly "an established business".

APPENDIX A

U.S. Constitution, Article III:

"Section 2, Clause 2. Supreme Court, Original and Appellate Jurisdiction

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

Appendices

APPENDIX B

Title 15, United States Code:

“§ 1053. Service marks registrable

Subject to the provisions relating to the registration of trademarks, so far as they are applicable, service marks used in commerce shall be registerable, in the same manner and with the same effect as are trade-marks, and when registered they shall be entitled to the protection provided in this chapter in the case of trade-marks, except when used so as to represent falsely that the owner thereof makes or sells the goods on which such mark is used. The Commissioner may establish a separate register for such service marks. Applications and procedure under this section shall conform as nearly as practicable to those prescribed for the registration of trademarks. July 5, 1946, c. 540, Title I, § 3, 60 Stat. 429.”

* * * *

“§ 1112. Classification of goods and services; registration in plurality of classes

The Commissioner may establish a classification of goods and services, for convenience of Patent Office administration, but not to limit or extend the applicant's rights. The applicant may file an application to register a mark for any or all of the goods and services upon or in connection with which he is actually using the mark: *Provided*, That when such goods or services fall within a plurality of classes, a fee equaling the sum of the fees for filing an application in each class shall be paid, and the Commissioner may issue a single certificate of registration for such mark. July 5, 1946, c. 540, Title IV,

§ 30, 60 Stat. 436; Oct. 9, 1962, Pub.L. 87-772, § 16, 76 Stat. 773.”

* * * *

“§ 1127. Construction and definitions; intent of chapter

In the construction of this chapter, unless the contrary is plainly apparent from the context—

* * * *

The word ‘commerce’ means all commerce which may lawfully be regulated by Congress.

The term ‘principal register’ refers to the register provided for by sections 1051 to 1072 of this title, and the term ‘supplemental register’ refers to the register provided for by sections 1091 to 1096 of this title.

The term ‘person’ and any other word or term used to designate the applicant or other entitled to a benefit or privilege or rendered liable under the provisions of this chapter includes a juristic person as well as a natural person. The term ‘juristic person’ includes a firm, corporation, union, association, or other organization capable of suing and being sued in a court of law.

The terms ‘applicant’ and ‘registrant’ embrace the legal representatives, predecessors, successors and assigns of such applicant or registrant.

* * * *

The term ‘service mark’ means a mark used in the sale or advertising of services to identify the services of one person and distinguish them from the services of others. Titles, character names and other distinctive features of radio or television programs may be registered as service marks notwithstanding that

they, or the programs, may advertise the goods of the sponsor.

The term 'mark' includes any trade-mark, service mark, collective mark, or certification mark entitled to registration under this chapter whether registered or not.

For the purposes of this chapter a mark shall be deemed to be used in commerce (a) on goods when it is placed in any manner on the goods or their containers or the displays associated therewith or on the tags or labels affixed thereto and the goods are sold or transported in commerce and (b) on services when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State or in this and a foreign country and the person rendering the services is engaged in commerce in connection therewith.

The intent of this chapter is to regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State, or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trade-marks, trade names, and unfair competition entered into between the United States and foreign nations. July 5, 1946, c. 540, Title X, § 45, 60 Stat. 443; Oct. 9, 1962, Pub.L. 87-772, § 21, 76 Stat. 774."

APPENDIX C

Title 28, United States Code:

"§ 1256. Court of Customs and Patent Appeals; certiorari

Cases in the Court of Customs and Patent Appeals may be reviewed by the Supreme Court by writ of certiorari. June 25, 1948, c. 646, 62 Stat. 928."

"§ 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

"June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 106, 63 Stat. 104."

APPENDIX D

Rules of the Court of Customs and Patent Appeals:

Rule 5.12 CALENDARING AND DISPOSITION OF CASES

“. . . (g) Decisions and Opinions—Publication. All decisions, and opinions accompanying decisions, of this court shall be provided to the parties, shall be public records of the court and shall be accessible to the public unless based upon proceedings held *in camera* or where a motion to seal the record has been granted under Rule 5.13(g). Opinions which do not add significantly or usefully to the body of law or would not have precedential value will not normally be published. Unpublished opinions shall not be cited as precedent and will not be accepted as such by this court except in support of a claim or *res judicata*, collateral estoppel, or law of the case.”

Rule 6.1 PETITION FOR REHEARING

“A petition for rehearing may be filed within 21 days from the date of decision. The petition shall comply with the printing and service requirements of Rules 5.8, 5.9 and 5.10. It shall be limited to and state points of law or fact which the petitioner believes the court has overlooked or misapprehended and shall not reargue points already considered by the court. Except by permission of the court, a petition for rehearing shall not exceed 10 pages if produced by standard typographic printing or 15 pages by any other process. Oral argument on the petition is not permitted. Any opposition to the petition must comply with the printing and service requirements for the petition and be filed within 10 days from date of service of the petition.”

Rule 6.2 MANDATES

“(a) When Issued. Mandates shall issue to the lower tribunal after 21 days from the date of decision. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition. If the petition is denied, the mandate shall issue 7 days after denial of the petition. A copy of the opinion or order of the court shall accompany the mandate.

(b) Stay. A stay of the mandate pending application to the Supreme Court of the United States for a writ of certiorari may be granted upon motion served on all parties. The stay shall not exceed 30 days unless the period is extended for cause shown. If during the stay the petition for a writ of certiorari has been filed, the stay will continue until final disposition of the case by the Supreme Court. Upon receipt of an order of the Supreme Court denying the petition, the mandate of the court shall issue.”

Procedural Handbook, The Court of Customs and Patent Appeals, May 1975

“. . . 19. Filing of Opinions. When an opinion of the court has been agreed upon, the authorizing judge sends a copy, along with any dissenting or concurring opinion, to the Reporter, who then supplies copies to the Clerk for filing and distribution. Neither the Reporter nor the Clerk is given advance information on when an opinion is to be handed down. On Thursday of each week throughout the year, the Clerk distributes copies of opinions which have been handed down by the court. If Thursday is a legal holiday, the opinion ‘down day’ for the week is Wednesday. The ‘down day’ is the decision (entry of judgment) date. Copies of published opin-

ions are sent to counsel, lower tribunals, and selected publishers. Non-published opinions are sent only to counsel and lower tribunals. File copies of opinions can be borrowed from the Clerk's office for reproduction by counsel."